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HO NUM CHON & ANOR v. TECH-LAB MANUFACTURING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[COMPANIES WINDING UP NO: WA-28NCC-499-06-2016]
B 7 OCTOBER 2016

COMPANY LAW: *Winding up – Petition – Application to strike out winding up petition – Two petitions filed for oppression and winding up at same time on substantially same set of facts – Whether there was multiplicity of proceedings –*
C *Whether an abuse of court process – Whether filing of winding up petition bona fide – Whether winding up petition unsustainable – Rules of Court 2012, O. 18 r. 19(1)(d) – Companies Act 1965, ss. 181 & 218*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out winding up petition – Two petitions filed for oppression and winding up at same*
D *time on substantially same set of facts – Whether there was multiplicity of proceedings – Whether an abuse of court process – Whether filing of winding up petition bona fide – Whether winding up petition unsustainable – Rules of Court 2012, O. 18 r. 19(1)(d) – Companies Act 1965, ss. 181 & 218*

This was an application by the respondent for the striking out of a winding
E up petition filed by the petitioners against the respondent on the ground of multiplicity of proceedings and an abuse of court process. On 20 April 2016, the petitioners commenced proceedings under s. 181 of the Companies Act 1965 ('the CA') against, *inter alia*, the respondent, contending that the affairs of the company were being conducted or the powers of its directors were
F being exercised in a manner oppressive to the petitioners and certain acts of the company had unfairly discriminated against or were otherwise prejudicial to the petitioners. The s. 181 proceedings were registered in and were pending before the High Court NCC2. On 25 May 2016, the petitioners applied for an interlocutory injunction in respect of the s. 181 proceedings
G to restrain the adjourned extraordinary general meeting ('EGM') of the respondent which was intended to approve the allocation of shares in the respondent. On 6 June 2016, the High Court ('NCC2') in the s. 181 proceedings heard and dismissed the petitioners' application for interlocutory injunction. On 15 June 2016, the petitioners proceeded to file a winding up petition ('NCC1') under ss. 218(1)(f) and s. 218 (1)(i) of the CA.
H The petitioners in essence referred to substantially the same facts as those set out in the s. 181 proceedings and contended that the respondent ought to be wound-up. The respondent submitted that the winding up petition was not *bona fide* and amounted to a multiplicity of proceedings and that it was an abuse of the court's process for the petitioner to have filed the s. 218 petition
I based on the same or substantially the same set of facts as those in the s. 181 proceedings. The petitioners, on the other hand, contended that they were entitled to file two proceedings, one under s. 181 and another under s. 218

at or about the same time and based on the same or substantially the same set of facts. The principal issue that arose for determination was whether the filing of a winding up petition and a minority oppression proceedings at about the same time based on substantially the same set of facts constituted a multiplicity of proceedings and was thus an abuse of the process of the court.

Held (allowing application):

(1) The filing of two separate proceedings under each of ss. 181 and 218 at about the same time and on the basis of substantially the same facts, and for similar relief which include the winding up of the company, ought to be deprecated and not countenanced – for they promote a multiplicity of proceedings and was an abuse of the court process. The conduct of the petitioners in instituting a winding up petition when it had already commenced an originating summons for minority oppression based on substantially the same facts, and seeking similar relief, was *prima facie* a multiplicity of proceedings and an abuse of court process. (para 40)

(2) A petitioner should decide right from the beginning what he actually wants – either for relief short of winding up or winding up itself. As a matter of practical reality, it is necessary to decide which petition should be heard first. If both petitions are heard together, the respondent is immediately put into an unfair position because of the effects which a winding up petition brings the moment it is filed. It does not assist clarity with respect to the role the court should play when confronted with two petitions – one to resolve difficulties during the continuing life of a company and the other to bring it to an end. These observations were valid, in congruence with the construction of the applicable law, and were certainly worthy of recognition and deserving of further discourse for legal development purposes, for they genuinely raised points of law with implications directly concerning the practice of instituting oppression action and winding up petitions in the country. (paras 42-44)

(3) In view of the pending winding up petition, the respondent could not proceed with the proposed EGM to increase its share capital and to issue new shares, for such course of action could potentially be void under s. 223 without a validation order. There appeared to be a collateral purpose for the filing of the winding up petition by the petitioners which was not entirely *bona fide*, especially since the predominant objective of having their shares bought out and the respondent company wound-up was already well specified in the orders prayed for in the originating summons for the s. 181 proceedings; without any truly meaningful reason for also repeating the same in the subsequently filed s. 218 winding up petition. (para 49)

(4) It was highly irregular for the s. 218 petition to be pursued in one High Court (NCC1) when substantially the same issues in s. 181 proceedings were to have been adjudicated and determined by another High Court already having seized of the jurisdiction of hearing the case where the subject matter was first instituted and filed. To have the matter heard and decided in this court regardless, in the form of a winding up petition instead, would unwittingly allow the court to be privy to the abuse of its own process, which situation must vigorously be avoided in order to ensure the integrity of the administration of the justice system was resolutely safeguarded at all times. (para 56)

(5) Of great significance was the question, rightfully raised by the respondent, as to why the transfer application was filed in NCC2 to have the s. 181 proceedings moved to this court instead. The assertions by the petitioners at the hearing that the case in NCC2 was already at an advanced stage, and that an appeal against the dismissal of the injunction had been filed, did not proffer a convincing or cogent basis to justify the transfer out (and as opposed to a transfer in, by moving the winding up petition to the court hearing the s. 181 proceedings registered first in time). The petitioners had filed the petition herein to unjustifiably avoid the matter from being heard and adjudicated by NCC2 since NCC2 did not decide in their favour on the interlocutory injunction application in the s. 181 proceedings. This patently bordered on being blatant attempts at having a second bite of the proverbial cherry and indulging in the reprehensible act of court shopping. (paras 58 & 59)

(6) The petitioners had commenced this winding up proceedings against the respondent in order to cause commercial embarrassment and economic prejudice to the respondent, apart from irreparable damage to the business operations and goodwill as well as the reputation of the respondent that could potentially ensue as a consequence. This reflected the lack of good faith on the part of the petitioners. This rendered the winding up petition so obviously unsustainable and more than adequately satisfied the basis for striking out the s. 218 petition filed by the petitioners under O. 18 r. 19(1)(d) of the Rules of Court 2012, under the inherent jurisdiction of the court, on account of the patent abuse of the process of the court on the part of the petitioners. (paras 60-65)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Popular Acres Sdn Bhd [2014] 1 LNS 619 HC ***(refd)***
Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC ***(refd)***
Buckland v. Palmer [1984] 1 WLR 1109 ***(refd)***
Chong Chee Yan v. Golden Dragon Garden Sdn Bhd [1999] 3 CLJ 151 HC ***(refd)***
Damayanti Kantilal Doshi & Ors v Jigarial Kantilal Doshi & Anor [2002] 8 CLJ 218 HC ***(refd)***
Eddie Lee Kim Tak v. JK Development Sdn Bhd & Ors [1997] 3 CLJ 894 HC ***(refd)***
Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 HC ***(refd)***
Jurupakat Sdn Bhd v. Kumpulan Good Earth [1973] Sdn Bhd [1988] 2 CLJ 649; [1988] 1 CLJ (Rep) 618 HC ***(refd)***

Kilo Asset Sdn Bhd v. Hew Tai Hong [2016] 2 CLJ 365 FC ***(refd)***
Lai Kim Loi v. Datuk Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***
Lesco Development Corp Sdn Bhd v. Malaysia Building Society Berhad [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***
Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors [2003] 8 CLJ 265 HC ***(refd)***
Manoharan Malayalam v. Menteri Dalam Negeri, Malaysia & Anor [2009] 2 CLJ 839 FC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Penang Port Commission v. Kanawagi Seperumaniam [2009] 1 CLJ 169 CA ***(refd)***
Raja Zainal Abidin Raja Tachik v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 3 CLJ 657 FC ***(refd)***
Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA ***(refd)***
Teh Chin Chuan & Anor v. Chuan Hong Co & Ors [1999] 1 LNS 143 HC ***(refd)***
The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 HC ***(dist)***
Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(1)(f), (i), 219(2), 221(2)(f), 223
Courts of Judicature Act 1964, s. 25(2), Schedule item II
Companies (Wnding-up) Rules 1972, r. 30(2)
Rules of Court 2012, O. 18 r. 19(1)(d), O. 94 r. 2
Rules of the High Court 1980, O. 1 r. 2(2)

For the petitioners - KF Eee & YP Hiew; M/s KF Ee & Co
For the respondent - Lua Ai Siew & Elyazura; M/s Soo Thien Ming & Nashrah

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an application by the respondent for the striking out of a winding up petition filed by the petitioners against the respondent on the ground of multiplicity of proceedings and an abuse of process. I heard the application on 2 August 2016 and allowed the same at the conclusion of the proceeding and gave the key and broad reasons for the decision. This judgment contains the full reasons for my decision, which includes analysis on the validity of concurrent proceedings under ss. 181 and 218 of the Companies Act 1965.

Key Background Facts

[2] On 20 April 2016, the petitioners commenced proceedings under s. 181 of the Companies Act 1965 ("the CA") *vide* KLHC OS No. WA-24NCC-164-04-2016 against *inter alia* the respondent, contending that the affairs of the company are being conducted or the powers of its directors are being exercised in a manner oppressive to the petitioners and certain acts of

A the company had unfairly discriminated against or are otherwise prejudicial to the petitioners. The petitioners prayed for an order, *inter alia*, that an injunction be issued to restrain an adjourned extraordinary general meeting ("EGM") of the respondent intended to approve the allocation of 350,000 shares in the respondent, and also included the prayers for the shares of the B petitioners in the respondent company to be bought, and for the respondent be wound up and a liquidator be appointed. The s. 181 proceedings were registered in and are now pending before the Kuala Lumpur High Court NCC2.

[3] On 25 May 2016, the petitioners applied for an interlocutory C injunction in respect of the s. 181 proceedings to restrain the EGM of the respondent. On 6 June 2016, the High Court (NCC2) in the s. 181 proceedings heard and dismissed the petitioners' said application for interlocutory injunction.

[4] On 15 June 2016, the petitioners proceeded to file a winding up D petition here in this court (NCC1) under ss. 218(1)(f) and 218(1)(i) of the CA. The petitioners in essence referred to substantially the same facts as those set out in the s. 181 proceedings and contended that the respondent ought to be wound up based on just and equitable grounds which they attributed to the allegation of the disappearance of the substratum and the main objective of E the respondent company, as well as to the deadlock in its management.

Key Contention Of Parties

[5] The principal issue to be determined is whether the filing of a winding-up petition and a minority oppression proceedings at about the same time F based on substantially the same set of facts constitute a multiplicity of proceedings and thus an abuse of the process of the court. The parties in dispute take a diametrically opposite stance on this important point of law concerning the validity of concurrent proceedings under s. 181 and s. 218 of the CA.

G **[6]** The respondent on the one hand submits that the winding up petition is not *bona fide* and amounts to a multiplicity of proceedings. It is an abuse of court's process for the petitioner to have filed this s. 218 petition based on the same or substantially the same set of facts as those in the s. 181 proceedings.

H **[7]** The petitioners on the other hand, contend that they are entitled to file two proceedings, one under s. 181 and another under s. 218 at or about the same time and based on the same or substantially the same set of facts, primarily relying on the High Court decision in *The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828; [1997] 4 MLJ 198 which I was applied in *Teh Chin Chuan & Anor v. Chuan Hong Co & Ors* [1999] 1 LNS 143; [1999] 5 MLJ 459.

[8] It is common ground and not disputed that the winding up petition is based on substantially the same facts relied on in the minority oppression proceedings. It will also be seen that there are common prayers sought by the petitioners in the two proceedings which concern the winding up of the respondent and the purchase of the shares held by the petitioners. I set out hereunder the relevant orders sought in each of the s. 181 proceedings and the s. 218 winding up petition:

Paragraph 57 of the Originating Summons – Section 181

(f) Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat untuk membeli saham-saham Plaintif Pertama dan Plaintif Kedua di dalam Defendan Kelima/TLM Sdn Bhd pada nilai RM15-85 per syer/saham;

(g) Secara alternatif kepada perenggan (f) di atas, bahawa Defendan Kelima digulungkan dan Likuidator/Pelikuidasi dilantik sebagai Pelikuidasi di dalam Defendan Kelima/TLM Sdn Bhd untuk melupuskan aset-aset di dalam Defendan Kelima dan membahagikan hasil-hasil/hasil-hasil jualan daripada itu kepada pemegang-pemegang saham di dalam Defendan Kelima/TLM Sdn Bhd.

Paragraph 26 of the Winding Up Petition

(a) bahawa Tech-Lab Manufacturing Sdn Bhd (No. Syarikat: 290681-X) digulungkan oleh Mahkamah yang Mulia ini seperti yang diperuntukkan dalam Akta Syarikat 1965;

(b) Ho Yeam Chan dan/atau Lim Chin Hong dan/atau Ho Li Wen untuk membeli saham-saham Pempetisyen-Pempetisyen dalam syarikat tersebut pada nilai RM15-85 per syer/saham;

(c) secara alternatif kepada perenggan (b) di atas, bahawa syarikat Responden tersebut digulungkan dan Likuidator/Pelikuidasi bernama Chua Hock Hoo (No. K/P: 660316-06-5335) dilantik sebagai Pelikuidasi di dalam syarikat Responden tersebut untuk melupuskan aset-aset di dalam syarikat tersebut dan membahagikan hasil-hasil/hasil-hasil jualan daripada itu kepada pemegang-pemegang saham di dalam syarikat tersebut;

[9] Much of the submissions made by parties revolve around their understanding and interpretation of a number of cases on the subject. It is, in my view, more useful and efficient that I make mention of those contentions in my analysis of the relevant cases, which I shall attempt to do next.

Evaluation And Findings Of This Court

Order 18 r. 19 Applies To Winding Up Petitions

[10] In *The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd* the petitioner filed two petitions against the same respondents under ss. 181 (then under the applicable rules, was by way of petition) and 218 respectively. The respondents filed applications to strike out the petitions. The High Court

dismissed both of the respondents' applications and held that the Rules of the High Court 1980 did not apply to a s. 218 petition and that the court has no inherent jurisdiction to strike out a winding up petition. RK Nathan JC (as he then was) said thus:

> The intent and purpose of excluding such a provision from the 1972 Rules must in my view be for the specific purpose of bringing into question O. 1 r. 2(3) of the RHC 1980 and I therefore hold that the RHC 1980 has no application to winding up petitions …
>
> …
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> In the light of my earlier finding that the RHC 1980 has no place in a s. 218 petition, I find myself unable to rely on O. 92 r. 4 of the RHC 1980 to hold that I have the inherent jurisdiction to strike out a s. 218 petition …

[11] In my view, it cannot be stated any more clearly than that a review of the law on this subject would lead one to conclude that *Lyn Country* does not definitively state the relevant legal position on the point concerning concurrent proceedings; even at the time it was decided. The crux of *Lyn Country* that the court has no inherent jurisdiction to strike out a winding up petition and that O. 18 r. 19 has no application to such petition had in fact already been previously judicially considered; and by the Federal Court no less, which had decided, quite unmistakably, in contradistinction to the said findings of the High Court in *Lyn Country*.

[12] The Federal Court in *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ 657 held that RHC O. 18 r. 19 applies to winding up proceedings. The power of the court to strike out was not even doubted, the issue was more on whether a claim for damages could be brought under a winding up petition. The following passages from the judgment of Mohamed Dzaiddin Abdullah FCJ (later Chief Justice), delivering the judgment of the Federal Court, are of relevance:

> Thus, the above two cases, aside from establishing that an unjustifiable application for winding up a company can lead to an action for damages against petitioner for malicious prosecution or for abuse of process of the Court, do fortify our view that a claim for damages should not be brought under a winding up petition or in an application to strike out the said petition under O. 18 r. 19(1) RHC, but ought to be filed as a separate action by way of a writ …
>
> In the circumstances of the case, and for the above reasons, we are of the opinion that the learned Judge was wrong, upon striking out the appellant's petition for winding up of the respondent as being an abuse of process, to grant damages to the respondent. There has to be a separate action for damages.

[13] That the position is now already trite is made crystal clear by Zaki Tun Azmi CJ in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481 who stated instructively thus:

> That O. 18 r. 19 applies to striking out a petition to wind up a company is well established.

[14] In addition, in fact, prior to *Lyn Country*, the former Supreme Court had earlier in *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16, as did the Federal Court in *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241; [1996] 1 MLJ 30 already ruled that the High Court has the inherent jurisdiction to prevent abuse of its own process. An even earlier decision of the High Court in *Jurupakat Sdn Bhd v. Kumpulan Good Earth [1973] Sdn Bhd* [1988] 2 CLJ 649; [1988] 1 CLJ (Rep) 618 also recorded Dr Zakaria Yatim J (as he then was) having struck out a winding up petition on the basis of O. 18 r. 19 and the inherent jurisdiction of the court. All these antecedent decisions which had already determined the issue in question were not referred to in the judgment of *Lyn Country*.

[15] It has not escaped my attention that counsel for both parties did not however expand much on the issue of whether the striking out provisions in the RC 2012 can rightfully be invoked to challenge a winding up petition. This was the basis of *Lyn Country, albeit* then considered under RHC 1980. Focus was instead on the validity of filing the two types of actions concurrently. There is certainly no submission to the effect that the RC 2012 have no application to winding up since the latter is governed by specific set of laws encapsulated in the Companies Act 1965 and the Companies (Winding-up) Rules 1972.

[16] But this is a relevant consideration to the instant case which in my view is deserving of some analysis, for there are cases such as the High Court decisions in *Alliance Bank Malaysia Bhd v. Popular Acres Sdn Bhd* [2014] 1 LNS 619 and *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd* [1999] 3 CLJ 151, which, like *The Lyn Country* categorically held that the striking out available under the Rules of Court is not applicable in respect of winding up petitions. An argument of some substance against the applicability of O. 18 r. 19 to winding up proceedings is that under the RC 2012, O. 94 r. 2 which, significantly, had no equivalent in the RHC 1980 states that in the event of any inconsistency, the rules under the written law in Appendix C to the RC 2012 shall prevail over the RC 2012. As winding up is governed by the written law in the CA and the rules made there under in the Companies (Winding-up) Rules 1972 ("Winding-up Rules"), any inconsistency must thus be resolved by adhering to the latter. This further supports the other provision in the RC 2012 which was already in the RHC 1980 in O. 1 r. 2(2) that states as follows:

A (2) these Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

[17] However, O. 1 r. 2(2) is not new and O. 94 r. 2 only gives emphasis B on what is already stated in O. 1 r. 2(2). Various precedents of high authority have, as I referred to earlier, such as the pronouncement by Zaki Tun Azmi CJ in *Blue Valley Plantation Bhd v. Periasamy Kuppusamy & Ors* clearly taken the position that O. 18 r. 19 can under the law be invoked to strike out a winding up petition.

C **[18]** Further, in my view, O. 1 r. 2(2) should rightfully only be construed as applying strictly, as should the new O. 94 r. 2, to situations where the specific rules in question can be found in both RC 2012 and the Winding-up Rules. For otherwise the issue of inconsistency cannot arise. Striking out is nowhere stated in the CA or its Winding-up Rules. The closest is probably D in s. 221(2)(f) of the CA, but even then, this is a generally worded provision which empowers the court to grant any orders it deems fit at the hearing of the petition.

[19] Nor can it be validly contended that the existence of r. 30 of the Winding-up Rules (which requires the company subject to the winding up E petition to file an affidavit no less than seven days before the hearing on the petition if it opposes the petition) means that this is the only avenue provided by the Winding-up Rules for the subject company to challenge the petition. It is not disputed that there are no specific provisions in the Winding-up Rules which provide for the right of the company to apply to strike out a F petition.

[20] But neither are there specific rules which prohibit the company from instituting such course of action to oppose the petition before the hearing of the petition. Even the provisions of r. 30 (despite the presence of the word "shall" and cases interpreting the same to be mandatory in nature) has G recently been clarified by the Federal Court in *Kilo Asset Sdn Bhd v. Hew Tai Hong* [2016] 2 CLJ 365; [2016] 1 MLJ 785 to the effect that r. 30(2) ought to be read harmoniously with other provisions in the CA and the Companies (Winding-up) Rules 1972 which vests the court with the discretion to abridge time.

H **[21]** The argument that the striking out application would tantamount to a tactical manoeuvre to delay the hearing of the petition is a separate issue. It has been described as the most abused procedure adopted in winding up proceedings by Abdul Hamid Mohamad JCA (later Chief Justice) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* I [2001] 3 CLJ 248. In that case, it was manifest that the Court of Appeal was against the practice of the respondent filing striking out application, and stressing that the procedure applicable in a writ action should not be

incorporated into a winding up proceeding. However, the Court of Appeal did not rule that a winding up petition cannot be struck out under the Rules of Court.

[22] The decision of the Court of Appeal in *Maril Rionebel* was subsequently followed by the same court in *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634, where Richard Malanjum JCA (now CJ (Sabah & Sarawak)) observed:

> An application made pursuant to O. 18 r. 19 RHC to strike out a petition presented under s. 218 of the Act is undesirable and should be discouraged, as such procedure would only delay the adjudication of the matter. This is not however to say that it is totally inapplicable, as the Order could be resorted to in cases where the petition is obviously unsustainable.

[23] Again, it is clear from the various judicial sentiments that such practice is to be deprecated. But it is not the law that O. 18 r. 19 cannot apply to winding up petitions. I agree that the court should be circumspect in entertaining a striking out application of winding up petitions, but in all such cases, what is paramount is to examine the reasons for the application to determine its *bona fides*. This was also exactly the decision of the Federal Court in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors*.

[24] As stated above, the Federal Court in that case made it clear that O. 18 r. 19 applies to striking out winding up petitions. But the Federal Court also at the same time expressed strong views on the undesirability of invoking a striking out procedure in a winding up petition since it could cause further delay rather than expedite the disposal of such matter. Nevertheless, the Federal Court examined the evidence and agreed to allow the appeal and in fact strike out the winding up petition. A relevant passage from the judgment of Zulkefli Ahmad Makinuddin FCJ (now CJ (Malaya)) is instructive:

> The appellant had a justifiable ground to file the application to strike out the petition when in good faith it had made payment into court to pay to the respondents the agreed sum under the consent order. As such, the respondents were deemed to have acted in a vexatious manner which was a good ground for striking out the petition. On the facts and circumstances of the case, the ground of inordinate delay could not be attributed to the appellant to dismiss its striking out application.

[25] Accordingly, given the weight of the applicable authorities, I hold that the High Court is seized of the jurisdictional power under the Rules of Court 2012 to strike out a winding up petition under O. 18 r. 19 and pursuant to the exercise of its inherent jurisdiction.

A **Concurrent Proceedings Under ss. 181 And 218 Is *Prima Facie* An Abuse Of Process**

[26] Another basis to distinguish *Lyn Country* is that the High Court had also relied on the former Supreme Court decision in *Lai Kim Loi v. Datuk Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61; [1989] 2 MLJ 290 B which had ruled that a "rolled up petition", which combined ss. 181 and 218 petitions to be defective as justifying the filing of separate actions under ss. 181 and 218 respectively.

[27] However, although "rolled-up petitions" were not favoured, nowhere C in its judgment did the Supreme Court in *Lai Kim Loi v. Dato Lai Fook Kim & Anor* sanction the filing of separate petitions under ss. 181 and 218 of the CA. In that case the petition under s. 181 was adjudged to have been filed also pursuant to s. 218, and that notwithstanding the petition, the petitioner had additionally instituted a writ action on the basis of substantially the same facts against the respondent company. Thus the day after the petitioner D presented a winding up petition against the second respondent (which petition also contained allegation of oppressive conduct by the first respondent under s. 181 of the CA), the petitioner filed a writ action against the first respondent in which substantially the same facts were averred as those stated in the petition and praying for substantially similar relief.

E **[28]** The former Supreme Court held that although the issues raised and relief sought are not totally similar, yet the substantial duplication of issues and relief sought in the writ summons and the petition which concerned transfer of shares amounted to multiplicity of proceedings, and the petition presented was therefore vexatious and an abuse of the process of the court. F The Supreme Court clearly held as follows:

> the petition presented was not in accordance with the provisions of the Companies Act 1965 itself, resulting in a petition which was, we would agree with counsel for the respondents, imprecise and which appears to us to be a hybrid petition purporting to have been presented under two G different sections of the Companies Act 1965.
>
> On the question of multiplicity, Mr Lim has conceded that the issues raised and the relief sought in Suit No S235 of 1985 have been largely duplicated in the said petition. Although the issues raised and the relief sought are not totally similar yet we consider that the substantial H duplication of issues and relief sought in both actions amounted to multiplicity of actions and in all the circumstances of this case, the petition presented is vexatious and is an abuse of the process of the court and ought to be struck out as the learned judge has done and not stayed or the petition be allowed to be amended as suggested by counsel for the petitioner. We were satisfied that the learned judge had exercised his I discretion correctly in striking out the petition and we therefore dismissed the appeal with costs. The deposit is to be paid to the respondents to the account of taxed costs. But to be fair and to ensure that the doors of

> justice are still open to him, we would add a further order to that made by the High Court that the petitioner be at liberty to file a proper petition under s. 181 of the Companies Act 1965, after disposal of Suit No S235 of 1985 if he still requires to seek remedy for acts which he alleged to be oppressive to him.

[29] There was thus a finding of a multiplicity of proceedings given the complication brought about by the filing of the writ; but the Supreme Court did not suggest that concurrent proceedings under ss. 181 and 218 petitions was possible.

Multiplicity Is An Abuse

[30] Furthermore, authorities have firmly established that multiplicity of proceedings tantamount to an abuse of process (see *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd & Anor* [1999] 4 CLJ 533) which the High Court has power to dismiss under its inherent jurisdiction or in pursuance of s. 25(2) of the Courts of Judicature Act 1964 read together with item 11 of the Schedule to the said Act, which states the following:

> Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

[31] The rationale behind the rule against multiplicity of proceedings was also considered by the English Court of Appeal in the case of *Buckland v. Palmer* [1984] 1 WLR 1109 where Sir John Donaldson MR, writing a separate judgment, made the following observation:

> The public interest in avoiding any possibility of two courts reaching inconsistent decisions on the same issue is undoubted ... Equally clear is the public interest in there being finality in litigation and in protecting citizens from being 'vexed' more than once by what is really the same claim.

[32] The High Court thus has the power to dismiss proceedings under s. 25(2) of the CJA where the matter is *res judicata* between the parties or by reason of multiplicity of proceedings. These two concepts are related. In the case of *Manoharan Malayalam v. Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 CLJ 839, Zulkefli Ahmad Makinuddin FCJ (now CJ (Malaya)), delivering the judgment of the Federal Court, held that the inclusion of the common law doctrine of *res judicata* in item 11 of the Schedule under s. 25(2) reflects the intention of legislators in formulating a policy to address the issue of multiplicity or overlapping of legal proceedings.

[33] The specific issue of the filing of separate proceedings on the same facts under ss. 181 and 218 concurrently was in fact considered again soon after *The Lyn Country* by the High Court in *Eddie Lee Kim Tak v. JK Development Sdn Bhd & Ors* [1997] 3 CLJ 894 which firmly ruled that such course of action to be *prima facie* a multiplicity of proceedings and thus an

abuse of the process of the court. In that case, for both petitions, the petitioner, like the petitioners in the instant case before me, prayed for an order that the company be wound up although in the oppression petition there was an alternative prayer for the purchase of the petitioner's shares by the respondent. The respondent therein applied for an order that the oppression petition be stayed permanently or that the petitioner be put to election whether to proceed with the oppression petition or the winding up petition. Abdul Aziz Mohamed J (as he then was) in allowing the respondent's application, held the following:

> [1] The presentation of two petitions is *prima facie* a multiplicity of proceedings amounting to an abuse of the process of the Court. A petitioner may have *bona fide* reasons for presenting two petitions but no such reasons were adduced in this case.
>
> [2] Where a statute provides for two or more courses for obtaining remedies, a person qualified to take either course has the right to take both courses with *bona fide* reasons and for a *bona fide* purpose. Where pursuit of all courses is unnecessary, unreasonable or illogical, there is an abuse of the process of the Court.

[34] The High Court in *Eddie Lee Kim Tak v. JK Development Sdn Bhd & Ors* also discussed *Lyn Country*'s analysis of the Supreme Court decision in *Lai Kim Loi*. The following passages are instructive:

> The other case relied on by the petitioner is *The Lynn Country Sdn Bhd v. Eic Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828, decided by Kamalanathan Ratnam JC on 15 June 1996.
>
> In that case the petitioner, two days after presenting a winding up petition, presented an oppression petition. The facts relied on in the two petitions were the same. The respondents applied for striking out of both petitions. Several grounds were put forward and considered in the judgment. The part of the judgment that dealt with the question of concurrency of the two petitions is at p. 45 onwards of the typed Judgment. The only statement of the learned Judge himself on the law or principle relating to the question of concurrent petitions under ss. 181 and 218 is the following at p. 47 of the typed Judgment:
>
> On the authority of *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 I am of the view that the petitioner has every right to present the petitions separately under ss. 181 and 218 of the Act respectively ...
>
> The learned Judicial Commissioner was relying on Lai Kim Loi for his view, but, to my understanding, Lai Kim Loi did not decide the question whether a person has a right to present petitions under ss. 181 and 218 concurrently ...
>
> ...
>
> Nowhere did the Supreme Court decide on the question of multiplicity arising from the existence of a petition under s. 181 and another under s. 218. Just as the question could not have arisen before the learned

> Judge, so it could not have arisen - and apparently did not arise - before the Supreme Court. The ruling of the Supreme Court that a rolled-up petition was bad - just as I said about the ruling of the learned Judge - must be taken as saying so much only, and that too about procedure, and must not be taken to mean that the Supreme Court - without hearing argument about multiplicity and abuse by reason of it, which it could not have and did not - also ruled that a petitioner had a right, whether absolute or qualified, to present a petition under s. 181 as well as a petition under s. 218.
>
> Having said that, however, I would note that at the end of the second paragraph the Supreme Court did say that if the petitioner, after disposal of Suit No. S235 of 1985 one way or another, still required a remedy for oppressive acts, he was at liberty to file "a proper petition under s. 181". The Supreme Court did not say that the petitioner was also at liberty to file a winding up petition under s. 218. That could be taken as an indication that, to the Supreme Court, what the petitioner really needed was a remedy for oppression, which he could obtain under s. 181, which empowers the Court to even order a winding up, and therefore the petitioner did not need to file also a petition for winding up under s. 218.
>
> It is clear to me that Lai Kim Loi is not an authority for the proposition, as stated in *The Lyn Country*, that a petitioner "has every right", which I take to mean an absolute right, to petition both under ss. 181 and 218.

[35] It is true that a subsequent decision of the High Court in *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* [2003] 8 CLJ 265 arrived at the opposite finding, ruling that a petitioner has the choice of filing either a winding up petition or originating oppression petition or both and proceed with the hearing even if both petitions contain the same set of facts so long as they are for different relief notwithstanding that one of the relief contained in the oppression petition is for the winding up of the company. It was emphasised by the High Court in *Loh Eng Leong* that s. 181 does not expressly limit that the same facts as alleged in s. 218 petition cannot be raised in a petition made thereunder.

[36] It is of relevance to note that the High Court in that case found the respondents to be guilty of abusing the court process by applying to strike out the s. 181 petition, in the following terms:

> [4] Even assuming that there was abuse on the part of the petitioners in filing both the petitions, the same ought to be apparent to the respondents either at the time when both petitions were filed and served on them in early 1998 or after the decision on the s. 218 Petition was delivered on 15 November 1999 or the latest on 21 July 2000 when the respondents sought the direction of the court. It certainly could not have been apparent only in May 2001 when encl. 77 was filed. On the facts, it was the respondents who have abused the process of the court by filing the application at such a late stage. (pp 306 e-i & 307 b-d).

A [5] The respondents have not acted with due promptness and reasonable diligence and were certainly guilty of unreasonable and unexplained delay. It is too late now for them to wake up to raise the issue of abuse of process and it is also manifestly unjust to shut the petitioners out from their statutory cause of action at this stage. More so when there is an order of His Lordship given on 21 July 2000 ordering that the petition B should proceed for hearing which remains unrevoked. (p 309 d-e)

[6] There was waiver and acquiescence on the part of the respondents of the rights to file this application to strike out the petition. The respondents have elected to proceed with the s. 181 Petition on its merits and impliedly had abandoned their rights to strike out when the matter proceeded for C hearing. By this conduct the respondents are estopped from asserting any such right to strike out the petition. (pp 308 f-g & 309 f-g).

[7] The court's inherent power to strike out a petition under O. 92 r. 4 RHC cannot be invoked at the slightest breach of the rules. On the facts, it will be an abuse of the inherent powers to strike out the s. 181 Petition. It is also clear that the inherent jurisdiction could only be invoked where D the rules, namely the RHC, do not contain specific provisions available to the respondents to strike out the petition. As O. 18 r. 19 expressly provides for such procedure, the court cannot therefore invoke the summary jurisdiction. (pp 314 b & 315 h).

E **[37]** In my view, it is imperative that the proposition enunciated by Abdul Aziz Mohamed J (as he then was) be appreciated in its proper context. It is clear that it was held by His Lordship in *Eddie Lee* that the filing of the two petitions is an abuse of process only on *prima facie* basis; and that good reasons could be shown to establish otherwise. Thus the facts and circumstances of each case must still be examined to determine where justice F of the matter should lie. The High Court in *Loh Eng Leong* took a slightly different approach which result, in substance is, in my view, no different from that pursued in *Eddie Lee*.

[38] In the former, the filing of both petitions was not in principle found objectionable, and the judicial examination on the facts found that it was the G respondent who had been guilty of abusing the process of the court. In the latter, the concurrent filings were held to be *prima facie* abusive of the process of the court, and no good reasons were established to show otherwise. Thus in all cases, clearly, the correct and practical principle to be applied is for the grounds for the filing of the two proceedings and the basis for opposing H the same be examined in order to determine whether or not the two constitute a multiplicity of proceedings and an abuse of process.

[39] Of greater relevance is the following statement of principle by Abdul Aziz Mohamad J (as he then was) which I would readily subscribe to:

I I am of opinion that the presentation by the petitioner of the two petitions is *prima facie* a multiplicity of proceedings amounting to an abuse of the process of the Court. With the presentation of the oppression petition, in which the petitioner prays for winding up of the company or, alternatively,

an order for the purchase of his shares, the winding up petition is wholly unnecessary. If the petitioner desires only a winding up, then the oppression petition is wholly unnecessary. **The abuse lies in the fact that one or other of the petitions is unnecessary. An unnecessary action is an abuse of the process of the Court.** A petitioner may have *bona fide* reasons for needing to present two petitions, as the petitioners in *Ng Seng Sun* successfully claimed before me they had, in which case the two petitions can be allowed to remain. In this case, however, no reasons have been advanced why the petitioner needed to present two petitions. At p. 6 of the petitioner's written submission it is said that "... here, for the reasons found in *Ng Seng Sun & 2 Ors. v. Ban Guan Hin Realty Sdn. Bhd. and Re Tivoli Freehold Ltd.* [1972] VR 446 ... it is abundantly clear that one action will not do". With respect, it is not at all clear to me that one petition will not do. I do not believe that the petitioner here meant to adopt as his justification for presenting the two petitions the justification put forward by or for the petitioners in *Ng Seng Sun*. The justification in a case depends on the particular circumstances of the case and cannot be adopted for another.

The proposition that, where statute provides two or more courses of action for obtaining remedies, a person qualified to take either of the courses has the right to take both courses and cannot be deprived of it is too sweeping a proposition. **A right is to be pursued with bona fide reasons and for a *bona fide* purpose.** Where pursuit of all the courses is unnecessary, unreasonable or illogical in the given circumstances of a case, there is an abuse of the right available through someone or other of the courses in insisting on following all the courses, and coming to Court to pursue all those rights is an abuse of the process of the Court. Such is the case with the two petitions here.

(emphasis added)

[40] For the above reasons, it would, in my judgment, be inevitable as it is compelling that *Eddie Lee Kim Tak* ought to be preferred over *Lyn Country* on this specific issue. I think it is incumbent upon this court to state that it should by now be considered as settled law that the filing of two separate proceedings under each of ss. 181 and 218 at about the same time and on the basis of substantially the same facts, and for similar relief which include the winding up of the company, ought to be deprecated and not countenanced – for they promote multiplicity of proceedings and an abuse of the court process. I thus hold that the conduct of the petitioners in the instant case in instituting a winding up petition when it had already commenced an originating summons for minority oppression based on substantially the same facts, and seeking similar relief, to be *prima facie* a multiplicity of proceedings and an abuse of process. In this context, the law's abhorrence of the risk of inconsistent decisions is the basis of the rule against multiplicity; and its aversion to unnecessary actions, given the duplicity and where the conduct is not made in good faith, is the essence of the abuse of process.

[41] For completeness, I should add that it would be remiss of me not to make mention of the highlight made by counsel for the respondent in its written submissions on the key observation of the learned author Loh Siew Cheang in his book *Corporate Powers & Accountability* (2nd edn), as follows:

> The idea that a s 181 petition and a winding up petition may be filed at the same commercial time is unsatisfactory. In this respect, the view of Abdul Aziz J (now JCA) in *Eddie Lee Kim Tak v. JK Development & Ors* is preferred.

[42] It is observed that the learned author put forward a number of points to support his position. In summary these are, firstly, it is said that a petitioner should decide right from the beginning what he actually wants – either for relief short of winding up or winding up itself. Secondly, as a matter of practical reality, it is necessary to decide which petition should be heard first. If both petitions are heard together, the respondent is immediately put into an unfair position because of the effects which a winding up petition brings the moment it is filed. Thirdly, it is argued that it does not assist clarity with respect to the role the court should play when confronted with two petitions – one to resolve difficulties during the continuing life of a company and the other to bring it to an end.

[43] Further, it was also stated by the learned author in the following terms:

> … To allow a s. 181 petition and a s. 218 petition to be filed by one petitioner at or about the same time has the potential for confusing the statutory purpose behind s. 181 of the Act as an alternative to compulsory winding up. It also has the potential of encouraging a petitioner to file a winding up petition in addition to a s. 181 petition and use the former as a bargaining tool to get what he wants other than a winding up order in the s. 181 petition from the respondents. One should not discount this possibility in commercial life.

[44] I consider these observations to be valid, in congruence with the construction of the applicable law, and are certainly worthy of recognition and deserving of further discourse for legal development purposes, for they do in my view genuinely raise points of law with implications directly concerning the practice of instituting oppression action and winding up petitions in the country.

Evidence Of Abuse And No Good Reasons To Show Otherwise

[45] Whilst the legal position has been made clear, it is thus of importance to now apply the same to the facts of the instant case. I have already stated that an unnecessary proceeding is an abuse of process. Absence of good faith is another. I must thus start by referring to the proposition that since this is not a striking out application on the basis of the petition not disclosing a reasonable cause of action but instead founded on an abuse of process, I am

entitled to consider the history of litigation between the parties to ascertain whether there is an abuse of process (see the former Supreme Court decision in *Raja Zainal Abidin Raja Tachik v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16).

Petition Sought To Achieve What Was Dismissed By Injunction Application

[46] A crucial fact to be taken into account is that the petition under s. 218 here in NCC1 was filed on 15 June 2016 by the petitioners soon after their application for interlocutory injunction in relation to their s. 181 proceedings was dismissed by High Court in NCC2 on 6 June 2016.

[47] It seems obvious to me that this suggests that having failed to obtain an interlocutory injunction to restrain the respondent from convening the EGM to consider the proposed resolution to increase its share capital and to issue new shares, the petitioners now resorted to filing a winding up petition to achieve, for all intents and purposes, the same effect of the intended result.

[48] This is attributed to the fact that under s. 219(2) of the CA, winding-up is deemed to have been commenced against the respondent on 15 June 2016, the filing date of the petition. Upon commencement of winding up, any disposal of property, transfer of shares and alteration of status of the shareholders is, as a result, prohibited under s. 223 of the same Act, unless validated by the court. For completeness, these key statutory provisions in a winding up process state the following:

> **Section 219**
>
> (1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
>
> (2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.
>
> **Section 223**
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[49] As such, in view of the pending winding up petition, the respondent could now not proceed with the proposed EGM to increase its share capital and to issue new shares, for such course of action could potentially be void under s. 223 without a validation order. Accordingly, in my judgment, there appears to be a collateral purpose for the filing of the winding up petition by the petitioners which is not entirely *bona fide*, especially since the

predominant objective of having their shares bought out and the respondent company wound up is, as mentioned earlier, also already well specified in the orders prayed for in the originating summons for the s. 181 proceedings; without any truly meaningful reason for also repeating the same in the subsequently filed s. 218 winding up petition.

Two Different Courts Determining Substantially Same Subject Matter; And Not Acceptable Even If There Is Application To Transfer To One Court

[50] There is another reason why the action of the petitioners in the instant case in filing the two proceedings is difficult to endorse. Whilst what is in effect a concurrent filing of the proceedings under s. 181 and s. 218 in the instant case is *prima facie* a form of an unnecessary multiplicity of proceeding, and thus an abuse of process, a greater concern would be if the two are filed in separate courts, for the resultant potentially inconsistent or conflicting decision of two High Court cannot be disregarded. In this connection, I should made reference to two relevant decisions of the Court of Appeal.

[51] The first is *Penang Port Commission v. Kanawagi s/o Seperumaniam* [2009] 1 CLJ 169, where the Court of Appeal ruled that there was multiplicity of proceedings which amounted to an abuse of the process of the court by the action of the plaintiff filing the originating summons which had the effect of pre-empting the hearing of an identical issue in an earlier writ action.

[52] In the case of *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 the Court of Appeal made it very clear that litigants must not resort to court process which has the effect of one branch of the High Court interfering with proceedings properly seized by another branch. This principle was followed in *Damayanti Kantilal Doshi & Ors v Jigarial Kantilal Doshi & Anor* [2002] 8 CLJ 218; [2001] 6 MLJ 417 where the High Court held as follows:

> The conduct of the plaintiff herein is akin to the conduct of the respondent in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 where the respondent instituted multiplicity of proceedings in respect of the same subject matter in the Penang High Court and Shah Alam High Court. The Court of Appeal in laying down the various circumstances in which the Court's process may be abused held that the intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch clearly smacks of abuse.

[53] The former Supreme Court in *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Berhad* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160; [1998] 2 MLJ 184 had also held it to be undesirable for two different courts to try and adjudicate on the same issues arising between the same parties concerning the same subject matter.

[54] In the instant case, it would accordingly be highly irregular for the s. 218 petition to be pursued in one High Court (NCC1) when substantially the same issues in s. 181 proceedings were to have been adjudicated and determined by another High Court (not to mention in the same Commercial Division in Kuala Lumpur) already having seized of the jurisdiction of hearing the case where the subject-matter was first instituted and filed.

[55] To have the matter heard and decided in my court regardless, in the form of a winding up petition instead, would in my view unwittingly allow the court to be privy to the abuse of its own process, which situation must vigorously be avoided in order to ensure the integrity of the administration of the justice system is resolutely safeguarded at all times.

[56] It is not disputed that on 27 June 2016, the petitioners applied in NCC2 to have the s. 181 proceedings transferred to this court to be heard together with the winding up petition or after one another. The petitioners probably think that such a move would address the concern of the risk of inconsistent decisions. Indeed this point was repeatedly made by counsel for the petitioners in their attempt to answer the concerns on multiplicity. But as I have said, the law is now clear that the filing of the two proceedings in the same court without good reasons is already objectionable and unacceptable. There is already an abuse – which lies in the fact that the petition is wholly unnecessary.

Transfer Is Sought Out Of The Original Court

[57] But of greater significance is the question, rightfully raised by the respondent, as to why the transfer application was filed in NCC2 to have the s. 181 proceedings moved to this court instead. One would have thought that the reverse situation would be more reasonably to be expected, especially since the s. 181 proceedings was filed first in time in NCC2, and particularly since the learned Judicial Commissioner in NCC2, having heard (and dismissed) the application for interlocutory injunction would already be familiar with the facts of the case.

[58] It is true that the transfer application has not been heard yet. If refused, the concerns on the risk of inconsistent decision persists. If allowed, the same court having to consider two similar subject matters is *prima facie* already an abuse. But the point is the very attempt at having the s. 181 proceedings moved out is already telling, given the circumstances. The assertions by counsel for the petitioners at the hearing that the case in NCC2 is already at an advanced stage, and that an appeal against the dismissal of the injunction had been filed, do not in my view proffer a convincing or cogent basis to justify the transfer-out (and as opposed to a transfer-in, by moving the winding up petition to the court hearing the s. 181 proceedings registered first in time).

[59] Instead a valid inference could thus be made, as had the respondent, that the petitioners have filed the petition herein to unjustifiably avoid the matter from being heard and adjudicated by NCC2 since NCC2 did not decide in their favour on the interlocutory injunction application in the s. 181 proceedings. This, in my view, patently borders on being blatant attempts at having a second bite of the proverbial cherry and indulging in the reprehensible act of court shopping. The abuse of the process of the court could not have been more glaring and stark. No court will countenance this.

Petition A Tactical Manoeuvre

[60] Furthermore, it is not in dispute that the respondent is a solvent company and is able to pay its just debt. The ground relied on by the petitioners is not the inability of the respondent to pay its debts. I thus find substance in the respondent's submission that the petitioners have commenced this winding up proceedings against the respondent in order to cause commercial embarrassment and economic prejudice to the respondent, apart from irreparable damage to the business, operations and goodwill as well as reputation of the respondent that could potentially ensue as a consequence. The petitioners could be said to be seeking to use this winding -up petition as a tactical manoeuvre to accomplish their ultimate objective of having their shares bought out, and which more than likely not genuinely involving the winding up of the respondent company.

[61] The above concerns reflect the lack of good faith on the part of the petitioners which further fortifies the finding on the abuse of process. Whilst strictly unnecessary for me to do so given my findings, for completeness I would further state that the assertion of the petitioners that the winding up petition is not unsustainable in view of the stated basis of the same which is that the substratum of the respondent company has been destroyed and that there is a deadlock in the management of the company is entirely untenable. First, these issues should rightfully be examined in the hearing proper of the petition. Secondly, the exact relief of winding up, given the same arguments of loss of substratum and management deadlock, is found in the s. 181 minority oppression proceeding. This duplicity is the crux of the objection raised by the respondent.

[62] The averment on the part of the petitioners, affirmed by Ho Num Chon, the first petitioner, that the main reason for the winding up as being attributed to the admission that the respondent and the petitioners are competitors is similarly unsustainable. I say so because, the position taken by the respondent, as affirmed in affidavits on its behalf affirmed by Ho Yeam Chan as the managing director of the respondent company and made clear at the hearing is that the petitioners were former directors of the respondent company who had following a dispute been removed a number of years back. This quite naturally resulted in a business competition, for relevant parties cannot obviously now work together.

[63] But the respondent company is otherwise running a solvent operation with its substratum appearing to remain intact and that any alleged deadlock having no bearing on the company since the dispute is between the respondent and its representatives on the one hand and the petitioners, on the other hand, who, it must be emphasised, are no longer in the management of the respondent to create a deadlock in management in the first place. The interest of the petitioners would thus be only in terms of their shareholding in the respondent. There is no complaint about their no longer being directors of the respondent. As such, even without examining the merits of the petition, which should rightfully be undertaken at the hearing proper, on the face of the affidavits filed in connection with this encl. 4, it appears to me that the case of the petitioners is fraught with a certain degree of substantive incoherence in respect of the validity of its stated grounds for winding up.

[64] Similarly, the petitioners' submissions on the grounds of winding up under ss. 218(1)(f) and (i) and the reference to a number of case law authorities are of little relevance to the hearing of this motion to strike out. Neither did counsel for the petitioners raise the same at the hearing, for the true position is that, even without ascertaining the merits of the petition, the concurrent filing of the two proceedings is a multiplicity which on the facts is also irresistibly an abuse of the process of the court.

Conclusion

[65] The filing of s. 181 and s. 218 proceedings at about the same time and on the basis of the same set of facts for similar relief is *prima facie* a form of a multiplicity of proceedings which is wholly unnecessary and constitute an abuse of process. A careful examination of the facts and circumstances concerning the filing of the winding up petition further reveal a conduct on the part of the petitioners which is considerably lacking in good faith. All these cannot legitimately lead one to any conclusion other that the inescapable; that it is manifestly an abuse of the process of the court. No good reasons have been proffered to show otherwise. This renders the winding up petition so obviously unsustainable, and more than adequately satisfies the basis for striking out the s. 218 petition filed by the petitioners under O. 18 r. 19(1)(d) of the RC 2012, under the inherent jurisdiction of the court, as well as pursuant to s. 25(2) of the CJA, all on account of the patent abuse of the process of the court on the part of the petitioners. Accordingly, I allow the application by way of notice of motion by the respondent in encl. 4 to strike out the winding up petition, with costs.